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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

vs.

JUDITH JAVA, et al.,
Appellees.

On Appeal From the United States District Court For the Northern District of California

BRIEF OF CALIFORNIA RURAL LEGAL ASSISTANCE, ET AL., AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The California Rural Legal Assistance, Atlanta Legal Aid Society, Legal Aid Bureau of Baltimore, Boston Legal Assistance Project, Camden Regional Legal Services, Legal Aid Society of Cleveland, Dallas Legal Service Foundation, Legal Aid and Defender Society of Greater Kansas City, and New Orleans Legal Assistance Corporation [hereinafter the "Legal Aid Societies"] are legal aid organizations providing legal assistance to indigent individuals in the communities they serve. A substantial proportion of the clients of each of the Legal Aid Societies consists of unemployed workers who have lost their jobs

due to a depression of the local economy, the seasonal nature of their employment, an industry-wide economic decline, or other factors beyond the workers' control.[1] For these individuals unemployment insurance benefits frequently provide the principal if not the only source of family sustenance.[2] State administrative procedures such as California Unemployment Insurance Code §1335 which permit the summary termination of benefit payments to eligible recipients not only impose additional legal and financial burdens on the average unemployed worker,[3] they may also threaten his family's very survival.[4]

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[1]Each of the legal aid societies represents a large number of individuals who have legal problems caused by unemployment. Between July 1, 1969 and June 30, 1970, for example, the California Rural Legal Assistance accepted almost as many unemployment insurance and related cases (1,007) as welfare cases (1,279). During this period, 38% of CRLA's clients were low-income "working poor."

[2]*See* Stein, *Work History, Attitudes and Income of the Unemployed,* 86 Monthly Labor Rev. 1405, 1411 (1963). Since unemployment insurance benefits constitute on the average only one-third of the recipient's former income, *see* U.S. Bureau of the Census, Statistical Abstract of the United States 292 (1970), unemployment insurance recipients must make substantial adjustments in their standard of living. For example, approximately 26% of all unemployment insurance claimants curtail their family's food expenses and 32% curtail their medical expenses within the first few weeks of unemployment. *See* P. Klein, Financial Adjustments to Unemployment 35, 40 (1965).

[3]Many unemployment insurance claimants are beset with legal problems as a result of their unemployment. Approximately 30% of all claimants become delinquent in payments on old appliances; 22% become delinquent in payments on new appliances; 14% become delinquent in rent payments; and 10% become delinquent in automobile payments. *See* P. Klein, Financial Adjustments to Unemployment 31 (1965). The legal problems of the average unemployment insurance recipient would increase substantially if his benefits were terminated leaving him with no income whatever.

[4]The economic effect on the average recipient of a wrongful termination of unemployment insurance benefits is discussed in Section III of this Brief, *infra.*

Two recent court proceedings dealing with the due process rights of California unemployment insurance recipients reveal the acute hardship suffered by recipients whose benefits are summarily terminated. In *Coronado v. California Department of Human Resources Development,* Los Angeles County Superior Court No. 974004 (preliminary injunction granted May 25, 1970) a recipient whose benefits were wrongfully terminated was unable to feed his family and was faced with imminent repossession of all his household furniture. In *Crow v. Shultz,* Civil No. 70 1128 ACW (N.D. Cal., October 12, 1970) a recipient whose benefits were wrongfully terminated was unable to make mortgage payments and was faced with loss of her family home. In both of these cases, the threatened harm was especially acute since the recipient was not eligible for welfare assistance.

Because the wrongful termination of unemployment insurance benefits can have disastrous legal, economic, and personal consequences for substantial numbers of the Legal Aid Societies' clients and for other persons similarly situated, the Legal Aid Societies urge that unemployment insurance recipients, like the welfare recipients in *Goldberg v. Kelly,* 397 U.S. 254 (1970), are entitled under the due process clause of the Fourteenth Amendment to a hearing prior to the termination of benefit payments. Although this brief is confined to the due process issue, the Legal Aid Societies fully support the ruling by the court below that the summary termination of unemployment insurance benefits for a period of six weeks pending an employ-

er's appeal violates not only the due process clause of the Fourteenth Amendment, but also the Social Security Act's requirement that unemployment insurance benefits be fully paid when due. 42 U.S.C. §503 (a)(1).

INTRODUCTION

Both parties to this case agree that due process is a flexible concept, which balances such factors as the reason for government action, the adverse impact of this action on the individual, and the alternatives available to the government to achieve its desired ends. *See Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 162-63 (1951) (Frankfurter, J.) (concurring opinion). In applying the due process balancing formula to the present case, however, the appellant California Department of Human Resources Development [hereinafter "the Department"] incorrectly interjects into the balance an alleged interest of the employer in not being deprived of his property without a prior hearing. As is shown in Section I of this brief, the employer's right to a prior hearing is in no way affected by the payment of benefits pending a referee hearing, since no charges for benefits previously paid are levied against the employer's reserve account if he is successful in his appeal. The alleged interest of the employer in this case is actually the interest of the Department in limiting the expenses of administering the unemployment insurance system.

The proper application of the due process formula weighs heavily in favor of requiring a hearing prior to the termination of unemployment insurance benefit payments to recipients whom the Department has found eligible for benefits. As is shown in Section III of this brief, the wrongful termination of unemployment insurance benefits can result in the average recipient being deprived of food, housing, medical care, and other necessities of life. The summary termination of benefits is also contrary to the public interest in maintaining an unemployed worker's purchasing power, since it prevents the prompt payment of benefits to eligible recipients and fosters the inaccurate resolution of disputed claims. *See* Section IV, *infra*. Balanced against this recipient and public interest in the payment of unemployment insurance benefits pending a hearing is the Department interest in minimizing expenses and conserving administrative resources. This interest is only minimally affected, however, since recipients are found eligible for benefits in the majority of appealed cases and since the Department has available proved methods of recouping any overpayments that should occur. In fact, the additional Department expenditures necessitated by the lower court's decision have amounted to less than .03% of the California unemployment insurance fund, and employer taxes have decreased substantially since the lower court's injunction became effective. *See* Section V, *infra*.

In its brief, the Department contends that this Court's description of the "brutal need" of welfare

recipients in *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) mandates a restriction of the right to a prior due process hearing to cases of welfare benefit termination. When government action seriously injures an individual, a prior hearing is the norm under due process, rather than the exception. *Cf. North American Storage Co. v. Chicago*, 211 U.S. 306 (1908). It would be anomalous indeed if the Court's recognition of the procedural due process rights of welfare recipients in *Goldberg* was used to curtail the procedural rights of unemployment insurance recipients, whom the Court has previously ruled are entitled to due process protections, *Sherbert v. Verner*, 374 U.S. 398 (1963), and whose needs usually approach if not equal those of welfare recipients.[5]

[5]In describing the reliance of welfare recipients on welfare benefits to obtain the necessities of life, the Court in *Goldberg* cited Nash v. Florida Industrial Commission, 389 U.S. 235 (1967). In *Nash*, the Court struck down an unlawful state restriction on eligibility for unemployment insurance compensation, pointing out that the termination of unemployment compensation would cause a man of modest means to "risk financial ruin." 389 U.S. at 239. As a practical matter, the needs of the majority of unemployment insurance recipients approximate those of welfare recipients. *See* Section III, *infra*.

ARGUMENT

The summary termination of unemployment insurance benefits pending a referee hearing violates due process, since it imposes severe economic hardship on eligible recipients while serving no significant governmental or employer interests.

I.

THE EMPLOYER'S "RIGHT TO BE HEARD" IS NOT AFFECTED BY THE PAYMENT OF UNEMPLOYMENT INSURANCE BENEFITS PENDING A REFEREE HEARING.

Throughout its brief, the Department refers to the due process question in this case as requiring the balancing of "the employer's right to be heard before his property is taken" against the prejudice to the recipient from the summary termination of his benefits. Appellants' Brief 11. In fact, the procedures at issue in this case have no effect whatever on the employer's right to a full due process hearing before being charged with any or all amounts paid to the recipient.

The resolution of an unemployment insurance claim involves two distinct issues: (1) whether the recipient is entitled to be paid benefits; and (2) whether, if the recipient is paid benefits, his former employer's reserve account[6] is to be charged with any or all of the benefits paid. These issues are separable. In certain cases, an unemployment insurance recipient may be paid benefits but his employer's account not be charged. *E.g.* Cal. Unemp. Ins. Code §§1380, 3702

[6]An employer's reserve account is a book account used as a factor in determining that employer's experience rating. An employer's tax contribution rate may be increased if additional charges are made against his reserve account and his experience rating is adversely affected. Cal. Unemp. Ins. Code §§1026, 1028 (Supp. 1970).

(Supp. 1970). In these cases, all benefits paid to a recipient are charged against the unemployment insurance fund's balancing account, which is a general account made up of uniform contributions by all employers, rather than against the particular employer's reserve account. Cal. Unemp. Ins. Code §976.5 (Supp. 1970).

The question affecting the employer in each unemployment insurance case is not whether the employee is paid benefits but rather whether the employer's reserve account is to be charged.[7] Under the provisions of California Unemployment Insurance Code §1380, an employer may not be charged for any amounts paid by the Department pursuant to an erroneous or unlawful eligibility determination. If, pursuant to the decision of the court below, benefits are paid pending a referee hearing to a recipient against whom an employer files an appeal, and if following the employer's appeal the referee determines that the recipient is not entitled to benefits, the referee must charge all benefits paid against the general balancing account rather than the employer's reserve account. Thus, regardless of a procedure requiring the continuation of benefit payments to a recipient pending an employer's appeal, the employer would receive a

[7]In states where the unemployment insurance fund does not maintain separate employer reserve accounts or experience rating systems, most employers never appeal determinations awarding benefits to claimants. *See* J. Beker, The Problem of Abuse in Unemployment Benefits 391 (1953). This is largely due to the fact that the employer does not have a direct financial stake in the outcome of the claim. *Id.* at 334.

full hearing before financial liability is imposed upon him.

Although the California Employers' *amicus* brief acknowledges that the payment of benefits pending an employer appeal would impose no direct financial liability upon the particular employer involved, it argues that the general payment of benefits pending employer appeals would reduce the balancing account thereby increasing the taxes of all employers, and that the imposition of this general increase would deny employers due process. Brief of Southern California Edison Company 6. In a case dealing with charges against employer reserve accounts in a workman's compensation system, the Court held that this remote possibility of a tax increase is not a sufficient injury to the employer to merit due process protection. *Gange Lumber Co. v. Rowley,* 326 U.S. 295, 305 (1945). Moreover, contrary to the exaggerated speculations of the employers, employer balancing account taxes have not increased following the issuance of the lower court's injunction, rather they have decreased to a new low.[8]

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[8] *See* California Department of Human Resources Development, *Low Tax Rate Seen for 1971,* 24 Human Resources Development Newsletter 1 (September, 1970).

As one of a general class of taxpayers, the employer does not have a constitutionally protected interest in the results of a given unemployment insurance eligibility determination. *Cf.* Frothingham v. Mellon, 262 U.S. 447 (1923). His interest in a given unemployment determination insofar as the balancing account is concerned is the same as the interest in a particular welfare case of a taxpayer concerned about rising welfare costs.

II.

AN UNEMPLOYMENT INSURANCE RECIPIENT WHO HAS BEEN ADMINISTRATIVELY DETERMINED TO BE ELIGIBLE FOR BENEFITS IS ENTITLED TO THE PROTECTIONS OF PROCEDURAL DUE PROCESS.

In pointing out that the unemployment insurance "trust fund" is composed of tax contributions of private employers rather than general tax funds, the Department urges that the state is a mere stakeholder in a private insurance program. Appellants' Brief 13. In *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 301 (1945) this Court held that a workman's compensation reserve fund made up solely of the employer tax contributions was "in no sense the private property of the employer," since "the moneys when collected are public moneys, held and administered by the state." Unemployment insurance is a government rather than a private benefit, and in administering the unemployment insurance system, the Department is subject to the Fourteenth Amendment's requirements of procedural due process. *Cf. Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

In holding that a welfare recipient who had initially been found eligible for benefits was entitled under the Fourteenth Amendment to a hearing before the termination of benefit payments, the Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970) stated that an individual's right to procedural due process when threatened with a withdrawal of government benefits followed from his having met the statutory criteria for entitlement to benefits. *Id.* at 262. The Court did

not explicitly state when an individual's statutory entitlement to government benefits is sufficiently established to merit the full protections of procedural due process, but the only practical means of classifying individuals who are entitled to full due process protection is to distinguish between recipients, who have been thoroughly investigated by the appropriate state administrative agency and have been found to have satisfied the statutory eligibility criteria, and initial claimants, who assert eligibility but whose right to benefits has never been officially established. For example, if the right to a hearing before the withholding of welfare benefits were extended to initial welfare applicants, large numbers of ineligible individuals might apply for welfare knowing that they would be paid pending a hearing, and a huge amount of welfare funds would be expended paying unrecoverable benefits to these ineligible claimants. As a practical matter, until an individual has officially established his eligibility his interest in the receipt of government benefits is too remote to entitle him to a prior due process hearing.

The California unemployment insurance recipient whom the Department has found eligible for benefits and against whom an employer appeal has been filed has the same interest in the continued receipt of benefit payments as the welfare recipient in *Goldberg* who has been found eligible for welfare and whose eligibility has subsequently been challenged by a welfare official. In both cases the appropriate state administrative

agency has thoroughly investigated the individual's claim for benefits.[9] In both cases the administrative agency has ruled that the individual meets the statutory requirements for eligibility.[10] In both cases this determination is subsequently challenged by an *ex parte* assertion that eligibility does not in fact exist.

The Department incorrectly assumes that if the lower court's decision in this case is sustained, unemployment insurance benefits would have to be paid pending appeal to initial applicants whom the Department has ruled ineligible for benefits as well as to recipents whom the Department has found eligible. Based upon this false assumption, the Department

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[9]The Department suggests that the administrative eligibility determination ruling is not a meaningful determination of whether an individual meets the unemployment insurance eligibility requirements. Appellants' Brief 16. The court below, in a detailed factual finding supported by abundant evidence, ruled that the eligibility determination ruling was the meaningful Departmental determination. Joint Appendix 135-37. In the making of the eligibility determination ruling, Department operating procedures require the conducting of a detailed investigation, the collecting of all available evidence, the hearing and if necessary the rehearing of all parties, and the rendering of a formal ruling. Joint Appendix 116-23.

[10]The Department erroneously suggests that an initial eligibility determination does not become "final" until ten days after it is rendered. *See* Appellants' Brief 19 n.14. As a practical matter, the eligibility determination ruling ends the Department's investigation of eligibility, as is shown by the fact that benefits are immediately commenced if the ruling is favorable to the claimant. If an appeal from the eligibility determination ruling is filed, the Department does not reopen the investigation. *See* Joint Appendix 124-26. The expiration of ten days offers the recipient no protection from a summary termination of benefits, since under Section 1335 benefits are terminated even if the employer files his appeal more than ten days after the Department's determination. If the appeal is filed beyond the ten day period, the employer must justify his delay at the referee hearing, but the recipient is in no way compensated for the delay. Cal. Unemp. Ins. Code § 1328.

projects huge estimates of the expenses and resulting tax increases that would be required. If the Court, consistent with its decision in *Goldberg,* limits the right to a due process hearing to individuals whom the Department has held eligible for unemployment insurance benefits, only a minimal expenditure of funds would result.[11]

III.

THE SUMMARY TERMINATION OF UNEMPLOYMENT INSURANCE BENEFITS IMPOSES SEVERE ECONOMIC HARDSHIP ON ELIGIBLE RECIPIENTS.

In assessing the impact of government action for the purpose of determining the requirements of procedural due process, one must look to the normal consequence of the government's action rather than to the exceptional circumstance. For example, some workers may not suffer severe harm if their paychecks are garnished. In *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 341-42 (1969), however, the Court ruled that because of the likelihood that in the majority of cases pre-judgment garnishment "may as a practical matter drive a wage-earning family to the wall," due process required a hearing prior to the seizure of a worker's paycheck. In the case *sub judice,* the likelihood of the poor family being "driven to the wall" by a wrongful termination of unemployment

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[11] As is shown in Part V of this brief, *infra,* the expenditure of funds necessitated by the lower court's injunction has been 494 times lower than the projections in the Department's Jurisdictional Statement and has amounted to less than .03% of the amount in the California Unemployment Insurance Reserve Fund.

insurance benefits is far greater than was the likelihood of severe economic deprivation in *Sniadach*, for unlike Mrs. Sniadach, who received from her garnished paycheck a statutory "subsistence allowance" of $25.00 to $40.00, 395 U.S. at 338 n.1, the terminated unemployment insurance recipient receives nothing to support himself and his family pending a hearing of his case.

By focusing on the fact that no means test is applied for unemployment insurance eligibility, the Department ignores the vital role played by unemployment insurance benefits in the lives of the vast majority of unemployed workers. Instituted to prevent a recurrence of the severe economic deprivations caused by the depression, unemployment insurance supplanted much of the protection against economic disaster formerly afforded unemployed workers through state relief payments. *Cf.* H.R. Rep. No. 615, 74th Cong., 1st Sess. p. 7 (1935). For hundreds of thousands of unemployed workers each year, unemployment insurance benefits provide vitally needed protection against the deprivations of poverty. *Cf.* Wickenden, *Unemployment Insurance and the War on Poverty*, 2 Unemp. Ins. Rev. 26 (1965).

For the average worker, unemployment imposes severe financial hardships despite the receipt of unemployment insurance benefits. After the worker applies for benefits, he must wait for two or more weeks before payment of benefits is begun. Joint Appendix 131-32. After he begins drawing benefits, the benefit checks he receives constitute only a fraction of his

former salary.[12] In order to adjust to the acute curtailment of family income, the average worker must reduce expenses for such items as food, housing and medical care, usually within the first few weeks after losing his job.[13] Unemployment insurance benefits thus sustain the recipient at a greatly reduced standard of living and render him economically vulnerable. Should benefits be terminated, the recipient would face the prospect of severe economic deprivation.

The Department's own statistics confirm that the average unemployed worker depends for sustenance on unemployment insurance benefits. From November 1968 through October 1969, the median annual earnings of persons filing unemployment insurance claims in California was $4,300. Affidavit of Nicolo Pino, *Coronado v. California Department of Human Resources Development,* Los Angeles County Superior Court No. 974004. Pursuant to California Unemployment Insurance Code §9110 (Supp. 1970), the Department has established the following income standards for defining "economically deprived" California families:

Husband, wife and 1 dependent	$4,100
Husband, wife and 2 dependents	5,200
Husband, wife and 3 dependents	6,200

[12]In 1969, unemployment insurance benefits nationally constituted an average of 34.3% of the worker's former salary. *See* U.S. Bureau of the Census, Statistical Abstract of the United States 292 (1970). In California, benefits constituted an average of 36.9% of the worker's former salary. *Id.*

[13]*See* P. Klein, Financial Adjustments to Unemployment 3, 40 (1965); *cf.* Comment, *The Relationship of Unemployment to Mortgage Foreclosures,* 86 Monthly Labor Rev. 1421 (1963).

By the state's own criteria, the average family drawing unemployment insurance is on the brink of "economic deprivation." The wrongful termination of benefits for a period of several weeks is thus likely to cause economic catastrophe.

For the unemployment insurance recipient whose benefits are summarily terminated, welfare or charity poses a cruel[14] and usually inadequate substitute for unemployment insurance payments. As a practical matter, welfare is totally unavailable for most single men and women and many married couples of working age who have no dependents.[15] Since an individual must own less than $600.00 in personal property to be eligible for welfare assistance, Cal. Welf. & Inst. Code §11257 (Supp. 1970), an unemployment insurance recipient with dependents must dispose of nearly all his assets before he can receive welfare. When and if an unemployed worker qualifies for welfare, the amount of his welfare benefits is usually considerably

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[14]As Congress recognized in instituting a national unemployment insurance program, the worker who looks upon receiving welfare as a source of embarrassment may lose his dignity and self-respect by being forced to apply for assistance. *See* Douglas, Standards of Unemployment Insurance 20 (1933).

[15]In most counties, only minimal welfare assistance is available unless an applicant qualifies for state programs of Aid to the Disabled, Aid to the Blind, Old Age Assistance, or Aid to Families with Dependent Children, Cal. Welf. & Inst. Code §§ 11200, 12000, 12500, 13500. For the family not qualifying for one of the state programs, the average welfare payment in California is $16.77 per week. *See* California Department of Human Resources Development, Public Welfare in California, Statistical Series PA3-152, at Table 11b (September, 1970); Silver, *The Imminent Failure of Legal Services For the Poor: Why and How to Limit Caseloads*, 46 U.Det.J. of Urban Law, 217, 229 (1969).

less than the amount he would have received in unemployment insurance benefits.[16]

IV.

THE SUMMARY TERMINATION OF UNEMPLOYMENT INSURANCE BENEFITS REGARDLESS OF THE MERITS OF THE RECIPIENT'S CASE FOSTERS THE INACCURATE RESOLUTION OF DISPUTED CLAIMS AND PREVENTS THE PROMPT PAYMENT OF BENEFITS TO ELIGIBLE RECIPIENTS.

The prompt payment of unemployment insurance benefits to all eligible recipients serves not only the interests of the recipients, but important governmental interests as well. Because unemployment insurance enables a worker to maintain his purchasing power through a period of unemployment, it promotes economic stability and aids the general economy. *See* Cal. Unemp. Ins. Code §§100, 101. By tiding workers over when they otherwise would have no income, it also reduces the burden on the public welfare rolls. *Cf.* H.R. Rep. No. 615, 74th Cong. 1st Sess, P. 7 (1935). The same public interests which counsel the institution of an unemployment insurance system also counsel the uninterrupted payment of benefits to all those eligible to receive them. *See Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

The automatic termination of benefits regardless of the merits of the recipient's case runs counter to both the governmental and recipient interest in the prompt

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[16]In the case *sub judice*, plaintiff Caroll Hudson received a welfare grant that was $100 per month less than the amount of her unemployment insurance benefits. Joint Appendix 11.

payment of unemployment insurance benefits to all eligible recipients. Without requiring the employer to present even a colorable showing that the recipient may be ineligible, Section 1335 terminates benefits for approximately six weeks despite the fact that the Department has concluded, after thorough investigation, that the recipient is entitled to benefits. According to the Department's own figures, this results in the objective of prompt payment of benefits to eligible recipients being frustrated in 64% of the appealed cases. Department Jurisdictional Statement, Appendix C, at 14.

In addition to delaying benefit payments to eligible recipients, Section 1335 tends to coerce eligible recipients to abandon meritorious claims. In *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341 (1969) the Court noted that the garnishment of a worker's wages tended to force the worker to accede to unmeritorious demands of creditors. Faced with the need to provide the necessities of life for himself and his family, the unemployment insurance recipient likewise can scarcely devote the time and energy necessary to prosecute his case effectively. *Cf.* Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 Yale L.J. 1234, 1244 (1967). Instead of waiting without funds for the six weeks before a referee hearing is held, the worker may accept substandard, menial employment rather than attempting to assert his right to benefits.[17] Thus, because of the severe financial

[17]Since many recipients view referee hearings as formal judicial proceedings, they are hesitant to undergo what they view as the ordeal of a "trial." *See* Harris, *Claimant Views of Unemployment Insurance Administration in California*, 4 Unemp. Ins. Rev. 2, 5 (1967).

pressures on claimants who have no source of income pending appeal, eligible recipients are likely to abandon appealed cases.[18]

V.

THE ADDITIONAL ADMINISTRATIVE BURDENS AND FINANCIAL EXPENDITURES RESULTING FROM THE PAYMENT OF BENEFITS PENDING A REFEREE HEARING ARE MINIMAL, SINCE RECIPIENTS ARE FOUND ELIGIBLE IN THE MAJORITY OF APPEALED CASES AND SINCE THE DEPARTMENT HAS AVAILABLE PROVED METHODS OF RECOUPING OVERPAYMENTS.

A principal due process issue in *Goldberg v. Kelly*, 397 U.S. 254 (1970), *aff'g Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968), was the weight to be afforded the government's interest in conserving fiscal and administrative resources when set against a welfare recipient's interest in not being wrongfully deprived of assistance, 397 U.S. at 261. The expenses necessitated by a prior hearing in *Goldberg* were substantial, since 64% of the recipients who appealed ultimately were determined to be ineligible, 294 F. Supp. at 901 n.17 (S.D.N.Y. 1968), and since any benefits paid to ineligible recipients pending a hearing were likely to be unrecoverable, 397 U.S. at 266. Moreover, since welfare recipients would know that appealing a termination of benefits would result in continued receipt of funds pending appeal, the num-

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[18]Section 1335 is an open invitation to an employer's filing a frivolous appeal in the hope of coercing the employee to abandon his claim. An employer risks nothing by filing a frivolous appeal, and he gains a substantial possibility that the employee will default, thereby removing a potential charge against his unemployment insurance reserve account.

ber of appeals filed would presumably rise and the burden on administrative resources would increase. Despite these large administrative and fiscal costs, the Court concluded that

> the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.
>
> 397 U.S. at 266.

In contrast to the sizeable expenditure of unrecoverable overpayments necessitated by the prior welfare hearings in *Goldberg,* the payment of unemployment insurance benefits pending an employer appeal would entail minimal depletion of Department fiscal resources. During 1969, 63.5% of the employer appeals resulted in decisions favorable to the recipient and therefore entailed no erroneous payment of benefits. *See* Department's Jurisdictional Statement, Appendix C, at 16. In cases where payments were made to ineligible recipients, the Department was successful in recouping 64% of the amounts paid. *Id.* at 15.[19] The payment of unemployment insurance benefits pending an employer appeal would thus result in a small amount of overpayments which would largely be recoverable.

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[19]Unlike welfare recipients, who are often unemployable and therefore likely to remain judgment proof, unemployment insurance recipients must be able to work and available for work. Cal. Unemp. Ins. Code § 1253. Unemployment insurance recipients who are overpaid when they are unemployed are thus likely to get a job and become solvent in the future.

The payment of unemployment insurance benefits pending an employer appeal would reduce rather than increase the administrative burden of handling appeals. Since appeals are filed by the employer, the recipient's potential receipt of benefits pending appeal does not serve as an inducement to the filing of more appeals. In fact, the number of appeals should be reduced, since employers would have less incentive to file frivolous appeals in the hope that the recipient will default. Unlike welfare, where the payment of assistance pending appeal tends to increase the number of appeals filed, the payment of unemployment insurance benefits pending an employer appeal would tend to decrease the number of appeals filed.

The Department presents elaborate cost estimates allegedly showing that the unemployment insurance reserve fund will lose millions of dollars each year if benefits are paid pending an employer's appeal. Department Jurisdictional Statement, Appendix C. These estimates are erroneous since they are based on the false assumptions that all persons would immediately be paid benefits upon applying for unemployment insurance, that benefit payments would be continued pending appeal for individuals whose claims are rejected by the Department, and that no overpayments would ever be recovered. *Id.* at 15, 17. However, if one uses the Department's figures but considers only the recipients who have initially been found eligible by the Department, who have lost in the employer appeal hearing, and who have failed to repay benefits received, one finds that the payment of benefits pending appeal would have cost $337,836 dur-

ing 1969.[20] In light of the fact that as of June, 1970 the California Unemployment Insurance Reserve Fund had a surplus of over $1.3 billion,[21] this expense would constitute less than a .03% charge against the fund. Since the California Unemployment Insurance Reserve Fund has been growing at a rate of over $92 million per year[22] (over 272 times the cost of paying benefits pending an employer appeal), the impact of this expense on employer taxpayers would be negligible.

In view of the minimal cost of paying benefits pending an employer appeal, it is not surprising that, contrary to the Department's dire predictions, employer taxes have not increased following the issuance of the lower court's injunction. Instead, employer taxes have decreased since the lower court's ruling took effect,[23] despite a substantial rise in the California unemployment rate. According to Department projections, the balancing account tax will be a new

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[20]According to Appendix C of the Department's Jurisdictional Statement, 2,990 Department determinations awarding benefits to an employee were reversed by a referee following an employer appeal in 1969. During this period, the median time elapsed between the filing of an appeal and the rendering of a referee decision was six weeks, and the average weekly benefit paid was $52.00. Thus, a total of $932,880 would have been paid to ineligible employees. However, since 64% of the benefits paid to ineligible employees were recovered by the Department, the net loss to the Unemployment Insurance Reserve Fund would have been only $337,836.

[21]*See* California Department of Human Resources Development, *California Fact Sheet*, 24 Human Resources Development Newsletter 4 (September 1970).

[22]*Id.*

[23]The District Court's injunction took effect on May 24, 1970. *See* Joint Appendix 2.

low of 0.6% during the tax year 1971.[24] The low experience rating tax schedule contained in California Unemployment Insurance Code §977 (Supp. 1970) will continue in effect and the taxable wage base determined by §930 (Supp. 1970) will remain at the lower level.[25]

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

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Respectfully submitted,

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[24] *See* California Department of Human Resources Development, *Low Tax Rate Seen For 1971*, 24 Human Resources Development Newsletter 1 (September 1970). Since benefits erroneously paid pending an employer appeal are charged against the unemployment insurance fund's balancing account, Cal. Unemp. Code § 976.5 (Supp. 1970), the balancing account tax would be most directly affected by the lower court's decision.

[25] *Id.*